

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLC NO. E152 OF 2023

**JAMES GITAU MWANGI &
WINFRED**

MWENDIA

GITAU.....PLAINTIFFS

VERSUS

BUFUMA TRADING

COMPANY LIMITED.....1ST

DEFENDANT

JOHN REX OMOLLEH.....2ND

DEFENDANT

THE COUNTY GOVERNMENT OF NAIROBI.....3RD

DEFENDANT

AND

**THE CHIEF LAND REGISTRAR.....INTERESTED
PARTY**

IN CONSOLIDATION WITH

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLC NO. E207 OF 2024

ETHICS & ANTI-CORRUPTION

**COMMISSION.....PLAINTIFF/
APPLICANT**

VERSUS

BUFUMA TRADING

COMPANY LIMITED.....1ST

DEFENDANT/RESPONDENT

wasting, disposing, developing, constructing or in any other manner whatsoever dealing with the parcels of land known as L.R. No. 37/242/21 (old number) or 37/386 (new number), I. R. No. 21393 in Nairobi West, Nairobi.

3. That pending inter partes hearing and determination of this suit the defendants by themselves, their agents, servants and/or employees or any other person interested in the suit property be restrained from alienating, selling, charging or further charging, leasing, transferring, charging, wasting, disposing, developing, constructing or in any other manner whatsoever dealing with the parcels of land known as L.R. No. 37/386, I. R. No. 21393 in Nairobi West, Nairobi.

4. The costs of this application be provided for.

2. The application is premised on the grounds *inter alia* that the plaintiff/applicant has a mandate to undertake investigations into allegations of corruption or economic crime, and in appropriate cases, institute civil proceedings for the recovery of public property.

3. The application was supported by the affidavit of Danso Siba, an investigator employed by the plaintiff/applicant which is sworn on even date. The plaintiff/applicant deposed that pursuant to

investigated allegations, LR. No. 37/242/21 (old number) or 37/386 (new number) I.R. No. 21393, the suit property has been illegally alienated by the defendants/respondents. Further, that on 15th October 1965, the City Council of Nairobi was issued with a letter of allotment and a grant for the suit property situated along Aerodrome Road, Gandhi Avenue in Nairobi West. It was deposed that the land was to be used for purposes of a children's playground and an open space for a period of 99 years commencing on 1st January, 1964.

4. The plaintiff/applicant deposed that the 4th and 5th defendants/respondents were the Director City Planning and Architecture and Chairman of the City Council of Nairobi and on 30th July, 1992, they illegally caused the suit property to be transferred to the 1st defendant/ respondent. Further, that the 4th and 5th defendants/ respondents purported to sell the same, yet it was not available for alienation or sale since it had been set aside as a children's playground. It was further deposed that the directors of the 1st defendant/respondent claimed to have paid Kshs. 80,000/- but there is no proof of payment to the City Council of Nairobi.
5. The plaintiff/applicant further deposed that the 4th and 5th defendants facilitated the said transfer to the 1st

defendant/respondent yet they ought to have known that Zipporah Wandera (deceased), the Town Clerk and her husband Alfuncis Wandera were at the time, the directors of the 1st defendant/respondent. Further, that the said transfer was executed by the 5th defendant/respondent together with the late Zipporah Wandera fraudulently and in complete disregard of the law.

6. The plaintiff/applicant deposed that on 7th April, 1997, the 1st defendant/respondent purported to sell the suit property which was illegally and fraudulently acquired by the 2nd and 3rd defendants/respondents for a sum of KShs. 2,000,000/- which is registered in their names. That apart from a perimeter wall built around the plot, there is no other permanent structures therein. It was deposed that the said alienation was unprocedural and illegal which has prompted the filing of this suit for recovery of the suit property.
7. The plaintiff/applicant deposed that it is apprehensive that the defendants/respondents may interfere with the suit property and unless the orders are granted, the government and the general public shall suffer irreparable injury.

8. In challenging this application, the 4th defendant/respondent filed the notice of motion dated 15th October 2024, expressed to be brought under **Order 2 Rule 15(1) (a)** and **Order 51 Rule 1** of the **Civil Procedure Rules** seeking the following orders:-

1. ***That this honourable court be pleased to strike out the plaint in this suit.***
2. ***That this suit be dismissed with costs; and***
3. ***That the costs of this application be borne by the plaintiff.***

9. The application is premised on the grounds that the suit discloses no reasonable cause of action against the 4th defendant, that it offends mandatory provisions of the law, and that it is an abuse of the process of the court.

10. The 4th defendant respondent also filed the notice of preliminary objection dated 15th October, 2024 challenging the suit on the following grounds:-

1. ***The suit herein is time barred.***
2. ***The suit herein is defective for misjoinder.***
3. ***The plaint offends the mandatory provisions of law.***
4. ***The suit is scandalous, frivolous and vexatious; and***

5. *The jurisdiction of this honourable court has been improperly invoked by the plaintiff.*

11. The 4th defendant/respondent filed the grounds of opposition dated 15th October, 2024 in opposition to the notice of motion dated 22nd May, 2024 on the following grounds:-

- 1. *The application is unmerited and defective in law.***
- 2. *The application is an abuse of court process and a waste of precious judicial time and resources.***
- 3. *The orders sought in this application are incapable of being granted in the circumstances of this case.***
- 4. *The application is only suitable to be dismissed with costs to the 4th defendant; and***
- 5. *Other grounds as may be adduced at the hearing of the application.***

12. The 2nd and 3rd defendants/respondents filed their replying affidavit sworn by the 2nd defendant/respondent on 16th May, 2025. The 2nd defendant/respondent deposed that on 7th April, 1997, together with the 3rd defendant/respondent, they entered into sale agreement with the 1st defendant/ respondent for the sale and purchase of the suit property. That a transfer dated 7th May, 1997 was executed and the ownership of the suit property

was transferred to them as joint tenants. He deposed that they have undertaken substantial developments on the suit property and entered into various lease agreements with tenants including Nairobi West Hospital who are the current tenants vide the lease agreement dated 1st November, 2020.

13. The 2nd defendant/respondent further deposed that their quiet possession of the suit property was interrupted by the 1st defendant/respondent who demanded rental payments from their tenants, and that on 21st October, 2023 the 1st defendant/respondent unlawfully invaded the suit property and attempted to assert possession on behalf of the 1st defendant/respondent. That as a result, they instituted the lead suit herein ELCLC No. E152 of 2023 seeking redress where orders of status quo were issued pending further orders.

14. The 2nd defendant/respondent deposed that the orders issued on 11th December, 2024 in their favour remain valid and binding to all parties including those in the consolidated suit. He deposed that prayers 2 and 3 sought in the application are untenable and incapable of being granted as they would directly contradict the said orders of status quo. He maintained that they are the lawful registered owners of the suit property, and that the allegation of irregular acquisition is false and an afterthought intended to

unjustly interfere with their quiet possession. He deposed that the instant application is an abuse of the court process and it is only fair that the same is dismissed.

15. The plaintiff/applicant filed its grounds of opposition dated 8th November, 2024 challenging the notice of motion and the notice of preliminary objection both dated 15th October, 2024 on the following grounds: -

1. ***That under Section 11(1)(j) of the Ethics and Anti-Corruption Commission Act 2011, the plaintiff is mandated to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.***
2. ***That the notice of preliminary objection is misguided and it is made oblivious of Section 42 (1)(b) of the Limitations of Actions Act, Cap 22, Laws of Kenya, that ousts the application of the Act to proceedings by the government to recover possession of government land.***
3. ***That further and in the alternative, under Section 20 (1) of the Limitations of Actions Act, no period of limitation is prescribed for a cause of action for fraudulent breach of trust, which***

is pleaded in the suit. That there is no limitation of actions for claims for breach of trust or fiduciary duty as stated in the case of Re Estate of Charles Ngotho Gachunga (Deceased) [2015] eKLR.

- 4. That the plaintiff has brought an action against the 4th and 5th defendants pursuant to Section 51 of the Anti-corruption and Economic Crimes Act (ACECA) in their individual capacity for illegal and fraudulent actions during their tenure at the City Council of Nairobi as the Director City Planning & Architecture and Chairman of the Nairobi City Commission respectively. Particulars of Fraud and illegality have been provided for.*
- 5. That the suit by the plaintiff is for recovery of land alienated for public use and reserved for use as children's playground and therefore it was not available for allocation to the 1st defendant. The Court of Appeal in the case of Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] eKLR stated that a plaintiff is entitled to pursue their claim in court however implausible the adverse party conceives it to be: Unless the defendant can demonstrate conclusively that the plaintiff's claim is so hopeless that it is bound to fail or is otherwise scandalous or an abuse of the process of the court, it must be allowed to proceed to trial.*

6. That the suit, being one for recovery of public land, it is in the public interest that it proceeds to full trial so as to determine the pertinent issues raised therein.

7. That the notice of motion is frivolous, vexatious and an abuse of the court process for being vague and ambiguous.

16. The 4th defendant/respondent filed his replying affidavit in response to the affidavit sworn on 1st April, 2025. The 4th defendant/respondent deposed that the suit property was allocated to the 1st defendant/respondent pursuant to resolution 3 (c) of the full commission meeting held on 4th August, 1992 which was approved by the Minister for Local Government who confirmed the same to the National Assembly for approval on 15th July, 1993. That by resolving to transfer the suit property, the City Council of Nairobi acted in conformity with **Sections 144, 145 (f), (g) and 177 (1)(e) of the Local Government Act.** The 4th defendant/ respondent deposed that he was not involved at all in the process of acquisition of the suit property by the 1st defendant/ respondent, and thus the application is misconceived and ought to be dismissed with costs.

17. Both applications and the preliminary objection were canvassed by way of written submissions. The plaintiff/applicant filed its

written submissions dated 17th June, 2025 where it raised two issues for determination as follows:-

i. Whether the plaintiff's notice of motion for interlocutory injunction dated 22nd May 2024 should be allowed; and

ii. Whether the 4th defendant's notice of preliminary objection and the notice of motion both dated 15th October, 2024 should be allowed.

- 18.** On the first issue, the plaintiff/applicant submitted that it has brought an action against the 4th and 5th defendants/respondents pursuant to **Sections 51 of the Anti-corruption and Economic Crimes Act** and **Sections 11(j) of the Ethics and Anti-Corruption Commission Act** in their individual capacity for illegal and fraudulent actions during their tenure at the City Council of Nairobi as the Director City Planning and Architecture and Chairman of Nairobi City Commission respectively. The plaintiff/applicant submitted that from its pleadings, it has established a prima facie case with a probability of success that the suit property is public land which was not available for alienation to any private persons.
- 19.** The plaintiff/applicant submitted that there is no material by the defendants/respondents to contradict its case, and there is real risk that the defendants/respondents are likely to adversely deal

with the suit property thus defeating the course and ends of substantive justice. Further, that where there is a conflict between public interest and private interest, the public interest should prevail to preserve and protect public land as it is the case here. Reliance was placed in the case of **Ethics & Anti-Corruption Commission v Njuguna Macharia [2015] eKLR**.

20. On the second issue, the plaintiff/ applicant submitted that the suit is properly filed in line with its mandate under **Section 11 (1)(j)** of the **Ethics and Anti-Corruption Commission Act**, and that the notice of preliminary objection is misconceived contrary to **Section 42 (1)(j)** of the **Limitations of Actions Act** that ousts application of the **Act** to proceedings by the government to recover possession of government land.
21. Further, it was submitted that it has not been demonstrated that the suit is an abuse of the court process, scandalous and is so hopeless that it cannot be heard and determined by this court. Reliance was placed in the cases of **Re Estate of Charles Ngotho Gachunga [2015] eKLR** and **Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] eKLR**.
22. The 2nd and 3rd defendants/respondents filed their written submissions dated 14th July, 2025. The same is with respect to

the notice of motion dated 22nd May, 2024. In their submissions, they raised two issues for consideration as listed below:-

- i. Whether the existing orders consolidating ELCLC No. E152 of 2023 with the present suit, and the preservation of status quo in favour of the 2nd and 3rd defendants, continue to remain valid and binding, thereby precluding any injunctive relief sought by the plaintiff; and*
- ii. Whether the plaintiff has met the criteria for grant of an order of temporary injunction pending the hearing and determination of the suit.*

23. On the first issue, the 2nd and 3rd defendants/respondents submitted that the essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to parties. Further, that the orders of status quo though not injunctive, are interlocutory orders intended to preserve the existing state of affairs pending the hearing and determination. To buttress on this issue, they relied on the cases of **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR** and **Mumo v HFC Limited & another (Civil Appeal 17 of 2019)**.

24. On the second issue, the 2nd and 3rd defendants/respondents submitted that the instant application is fundamentally flawed given its direct conflict with the binding status quo orders. They submitted that the plaintiff/applicant has not demonstrated an enforceable right that has been violated or is under imminent threat, and which does not satisfy the legal threshold in **Giella v Cassman Brown [1973] EA 358**. They submitted that if the court is to grant injunctive relief in the instant application, it would confer legitimacy upon the plaintiff/applicant's claim which fails the most basic legal test.
25. The 2nd and 3rd defendants/respondents further submitted there is no demonstration of loss that damages would be insufficient to redress it. While relying on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, they submitted that if anything, they stand to suffer substantial and irreparable harm if the court were to upend the existing arrangement under the status quo orders.
26. In conclusion, the 2nd and 3rd defendants/respondents submitted that any inconvenience can be adequately awarded by damages thus negating the necessity for an equitable relief at this interlocutory stage.

27. The 4th defendant/ respondent filed his written submissions dated 9th June, 2025. With regard to the notice of motion and the notice of preliminary objection both dated 15th October, 2024, the 4th defendant/ respondent submitted that the suit discloses no reasonable cause of action against him and prays that the same be struck out. He relied on the case of **DT Dobie & Co. (K) Ltd v Muchina [1982] eKLR**.
28. On whether the suit is time barred, he submitted that alleged cause of action in the suit arose in the year 1992 and that the instant suit has been brought nearly 30 years since the cause of action arose. He submitted that this is beyond the 12- year period set out under the **Limitations of Actions Act**.
29. On the notice of motion dated 22nd May 2024, the 4th defendant/respondent submitted that the application for injunction is premised on contested facts which requires this court to delve into the merits of the case, and that on this basis, the application does not establish a prima facie case against him. The 4th defendant/respondent relied on the cases of Paul **Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR**, Isabel **Chelangat v Samuel Tiro Rotich & 5 Others [2012] eKLR**, and **Giella v Cassman Brown & Co. Ltd [1973] EA 358**.

- 30.** The 4th defendant/respondent further submitted that the plaintiff/applicant will not suffer irreparable harm if the orders are not granted. Further, that the suit property was lawfully and procedurally transferred to the 1st defendant/respondent in the year 1992. He submitted that the balance of convenience will be achieved by dismissing this application. In conclusion, he urged the court to dismiss the application with costs.
- 31.** I have carefully analyzed and considered the applications, the notice of preliminary objections, the replies thereof and the written submissions filed by the parties. I am of the view that the issue for determination is *whether both applications are merited and whether the notice of preliminary objection ought to be upheld.*
- 32.** I will begin with the notice of motion dated 22nd May, 2024 filed by the plaintiff/applicant. In this application, the plaintiff/applicant seeks temporary injunction orders against the defendants/respondents with respect to the suit property on the grounds that following investigations, it was discovered that the same was unlawfully alienated and transferred to the 1st defendant/respondent who later sold the same to the 2nd and 3rd defendants/respondents. The alleged unlawful and unprocedural

acts were committed by the 4th and 5th defendants/respondents in their different capacities who at the time were working for the City Council of Nairobi. The plaintiff/applicant contended that the suit property is public land meant for a children playground and open space, and it is apprehensive that the same may be altered or dealt with in a manner that would defeat justice and recovery of the same, thus necessitating the filing of this application.

- 33.** The 2nd and 3rd defendants/respondents argued that the orders cannot be issued because they are the rightful owners of the suit property, and more so that there are orders of status quo in place in ELCLC No. E152 of 2023. They argued that if the orders are issued, it would infer legitimacy to the plaintiff's/applicant's case, and create a conflicting situation based on the existing orders.
- 34.** The 4th defendant/respondent maintained that the suit property was lawfully allocated to the 1st defendant/respondent through a full commission meeting and with the approval of the National Assembly. He stated that he was not involved in the acquisition of the same by the 1st defendant/respondent and as such the application is misconceived.

35. As stated earlier, on 19th February 2025, this suit was consolidated with the lead file i.e. ELCLC No. E152 of 2023. On 2nd December, 2024, the court ordered that status quo over and in respect of the suit property shall be maintained. For coherence, the court directed that there shall be no interference with the current occupation, possession, and use of the suit property by the plaintiff until further orders. Before consolidation of the two matters, these orders were in force at the time, and the same have not been appealed against, set aside or varied. This means that they are valid. For the court to consider the instant application, which involves the same subject matter, there is likelihood that there will be a conflict in the decision which would be embarrassing to say the least. There being orders of status quo, this court refrains from pronouncing itself on the instant application to avoid a situation where the court would be sitting on an appeal of its own orders.

36. With regard to the notice of motion dated 15th October 2024, and the notice of preliminary objection of even date, the same are challenging the suit on the grounds that it discloses no reasonable cause of action, that it offends mandatory provisions of the law and that it is an abuse of the court process. In the notice of preliminary objection, the 4th defendant/respondent argued that the suit is time barred, and defective for misjoinder.

The 4th defendant/respondent argued that the cause of action arose in the year 1992 when the 1st defendant/respondent acquired ownership of the suit property through a lawful process. He maintained as earlier stated that he was not involved in the acquisition of the suit property by the 1st defendant/respondent, thus citing misjoinder.

37. The plaintiff/applicant contended that the government is exempted from the provisions of **Limitations of Actions Act** more so where it seeks to recover land that was fraudulently acquired. The question then is, is the suit time barred? Does it offend mandatory provisions of the law, and is the 4th defendant/respondent properly joined in these proceedings?

38. I have perused the plaint dated 22nd May, 2024, and the plaintiff/applicant is seeking declaratory orders over the suit property, rectification of register and cancellation of all entries relating to the transfer, vacant possession, permanent injunction and general damages. These orders are sought against the 1st to the 3rd defendants/respondents. In the plaint, the plaintiff/applicant has pleaded acts committed by the 4th defendant/respondent as contained in paragraphs 4, 10, 11, and 13. More specifically, the plaintiff/applicant has pleaded particulars of fraud and illegality on the part of the 4th and 5th

defendants/respondents, and particulars of breach of trust and abuse of office against the 4th and 5th defendants. In the case of **Ramji Megji Gudka Ltd versus Alfred Morfat Omundi Michira & 2 Others [2005]** eKLR, it was held as follows:-

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of

the trial judge in disposing of the case in the way he thinks right.”

39. While I place reliance on the above authority, and in my view, the alleged acts as pleaded by the plaintiff/applicant are not issues that can be taken lightly as they bear heavy weight on the actions of the 4th defendant/respondent during his service at the City Council of Nairobi. Notably, and if the record bears witness, the 4th defendant/respondent has not filed a defence to enable the court appreciate the disputed facts from the undisputed facts. As it is, and in the absence of any statement to the contrary, the 4th defendant/respondent cannot argue that no reasonable cause of action has been disclosed where allegations have been levelled against him.

40. On whether the suit is time barred, **Section 26 of the Limitation of Actions Act** provides as follows:-

“Where, in the case of an action for which a period of limitation is prescribed, either -

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:"

41. Further, **Section 42 (1) (d)** of the same **Act** further provides:-

"The Act does not apply to proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connection with any such recovery; or..."

42. From the above, it is clear that the plaintiff/applicant is within the law to move the court accordingly based on the functions bestowed upon it by the **Constitution**, the **Anti- Corruption and Economic Crimes Act** and **Ethics and Anti-Corruption Commission Act**. In the end, I find that the notice of motion dated 22nd May, 2024, the notice of motion dated 15th October 2024, and the notice of preliminary objection dated 15th October, 2024 lacking in merit and they are all dismissed. Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 17TH DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
17/11/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

*Mr. Malinzi for the Defendant in 152/2023 and 2nd Defendant
/Respondent in 207/2024*

*Ms. Simiyu holding brief for Mr. Ongoto for the 1st Interested
Party in E152/2023*

*Ms. A. Muthoni holding brief for Ms. Mburu for the
Plaintiff/Applicant in 152/2023 and the 2nd and 3rd Defendant in
E207/2024*